

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**MARQUEZ BROTHERS ENTERPRISES,  
INC.**

**AND**

**ALFONSO MARES**

**AND**

**JAVIER AVILA**  
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NLRB Case Nos.: **21-CA-039581**  
**21-CA-039609**

**RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE GENERAL**  
**COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR**  
**RECONSIDERATION OF NLRB ORDER**

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## **I. INTRODUCTION.**

Claimants Alfonso Mares (“Mares”) and Javier Avila (“Avila,” collectively “Claimants”) willfully refused to comply with Respondent Marquez Brothers Enterprises, Inc.’s (“Respondent”) subpoena duces tecum and Administrative Law Judge Lisa Thompson’s (“ALJ”) Orders regarding same. In her Opposition, Counsel for the General Counsel (“CGC”) maintains that Claimants engaged in a “diligent search effort” to produce responsive documents. See CGC Opposition (“Opp.”), p. 2. However, there is no record evidence of Claimants having made a diligent search effort to comply with Respondent’s subpoenas. Rather, the record evidence unequivocally demonstrates Claimants failed to make a reasonable effort to comply with Respondent’s subpoenas and the ALJ’s Orders. The record evidence also demonstrates Claimants deliberately withheld documents that negatively impacted their case. The record evidence also demonstrates Claimants produced documents to CGC but did not produce documents to Respondent at the same time. CGC completely fails to address Claimants’ glaring misconduct in her Opposition.

Furthermore, CGC has maintained throughout these proceedings that CGC is **not** Claimants’ counsel. Nonetheless, during the Hearing, CGC acted as Claimants’ counsel by repeatedly making representations to the ALJ of Claimants’ alleged efforts to comply with Respondent’s subpoenas, communicating with Claimants about the subpoenas and instructing Claimants not to speak with Respondent’s counsel. Once more, CGC continues to act as Claimants’ counsel by asserting in her Opposition that Claimants have engaged in a “diligent search effort” to produce responsive documents. See CGC Opp., p. 2. However, CGC is not Claimants’ counsel and, as such, CGC cannot make representations on behalf of Claimants regarding their alleged search efforts. The above conduct obstructed the subpoena process.

Moreover, in its ruling, the National Labor Relations Board (“NLRB” or “Board”) described various alternatives it urged the ALJ to consider in lieu of the sanctions ordered. In its Motion for Reconsideration (“Motion”), Respondent detailed how many of these alternatives were provided to Claimants through the course of the proceedings and how Claimants still failed to comply with Respondent’s subpoenas and the ALJ’s Orders and even began to blatantly withhold documents. CGC’s Opposition fails to address how these alternatives still resulted in misconduct by Claimants.

Furthermore, Respondent clearly identified the “extraordinary circumstances” warranting the Board’s reconsideration of its ruling. The Board’s ruling is a departure from Board precedent which has repeatedly affirmed the ALJ’s authority to issue sanctions against parties refusing to comply with Board subpoenas. This is especially true in cases mirroring the present case where the noncomplying party is willfully refusing to produce documents. Thus, Respondent respectfully requests the Board to reconsider its September 7, 2017 Order.

## **II. ARGUMENT.**

Claimants failed to comply with Respondent’s subpoenas and the ALJ’s Orders and did not produce all documents responsive to the subpoenas. Claimants also repeatedly engaged in one-sided production, gathering and producing documents to CGC and/or the Compliance Officer, but failing to do the same pursuant to Respondent’s subpoenas. Claimants even withheld documents that were damaging to their case. It is evident based on Claimants’ conduct throughout the Hearing that the alternative measures proposed by the Board to allow for complete document production (*i.e.*, permitting Claimants to testify regarding their interim earnings and providing additional time to gather documents) would not have resulted in compliance with Respondent’s subpoenas. Furthermore, when Claimants were given the opportunity to explain their search

efforts to comply with Respondent's subpoenas, both admitted under oath to possessing additional responsive documents which they had not produced (and never did produce in many instances).

Board precedent is clear that in such circumstances, the ALJ has the authority to impose sanctions upon the bad actor and that CGC can be sanctioned for Claimants' refusal to comply with Respondent's subpoenas. See 300 Exhibit Services & Events, 356 NLRB No. 66, fn. 1 (2010); Bannon Mills, 146 NLRB 611, 613, n. 4, 633-634 (1964). Since the Board's ruling was a departure from Board precedent, Respondent has demonstrated the extraordinary circumstance warranting its Motion. See Enloe Med. Ctr., 346 NLRB 854, 855 (2006).

Furthermore, CGC repeatedly acted as Claimants' counsel during these proceedings by instructing Claimants not to speak with Respondent, by relaying document production from Claimants to Respondent and by making representations on behalf of Claimants as to the completeness of their document production. CGC's conduct furthered Claimants' misconduct and CGC's assertions of Claimants' alleged search efforts and compliance with Respondent's subpoenas must be disregarded.

**A. Claimants Failed to Engage in Reasonable Search Efforts and Failed to Produce All Responsive Documents.**

Claimants failed to engage in reasonable search efforts to comply with Respondent's subpoenas and the ALJ's Orders and failed to produce all responsive documents. It is undisputed Claimants had ample time to comply with Respondent's subpoenas and failed to do so. This is most clearly demonstrated by the fact that Claimants failed to produce all of their bank statements and all copies of their resumes – documents which were entirely in their possession and easily accessible. Claimants also admitted under oath to possessing additional responsive documents, yet never produced the documents. This is clearly seen by Avila's failure to provide any documents from the Fidelity account even after admitting he could easily do so. Tr. 28.

Moreover, CGC's assertions regarding Claimants' document production are inaccurate. Mares did not produce "most" of his W-2 Wage and Tax Statements on the first day of the Hearing. CGC Opp. p. 2. Rather, Mares produced only five (5) pages of documents in response to only one of Respondent's three subpoenas served on Mares. Additionally, Mares did not produce any documents in response to the subpoenas served on his trucking company. Further inaccurate is CGC's assertion that Claimants produced a "substantial amount of documents" on August 9, 2017, the second day of the Hearing. While Claimants did produce additional documents, it was not substantial and did not result in compliance with Respondent's subpoenas or the ALJ's Orders.

Claimants also engaged in one-sided production throughout the proceedings, producing documents to CGC which were never produced to Respondent even though requested by the subpoenas. Tr. 26; See CGC Ex. 18 and 19. Furthermore, as discussed below, it became evident Claimants were withholding documents which negatively impacted their case. Additionally, the rolling production of documents contradicts the purpose of a subpoena: to have all responsive documents produced by a certain date, and violates Respondent's due process rights since Respondent is required to re-examine its trial strategy with each new production.

To justify this failure, CGC proposes in her Opposition that Claimants should have been given the opportunity to explain their refusal to comply with the subpoenas and the ALJ's Orders. However, CGC fails to address the fact Claimants did have an opportunity to describe their search efforts on the first day of the Hearing when the ALJ questioned Claimants regarding their efforts to search for responsive documents. Both Claimants admitted under oath to possessing additional responsive documents which they had not produced. In fact, during his testimony, Avila confirmed his lack of any effort and even admitted that whatever documents he had, he gathered and produced to the Compliance Officer but not to Respondent. Tr. 26. In sum, Claimants refused to comply

with Respondent's subpoenas and the ALJ's Orders.

**B. Claimants Withheld Documents Which Resulted in Severe Prejudice to Respondent's Case.**

As the Hearing progressed, it became evident Claimants were withholding documents that negatively impacted their case, resulting in severe prejudice to Respondent's case. Board precedent makes clear that the refusal to produce responsive documents which bear on issues germane to the case results in prejudice. See Indiana Hosp. v. NLRB, 10 F.3d 151, 151 (3d Cir. 1993) (finding the employer had been prejudiced by the revocation of its subpoenas because it could have sought to introduce memoranda of the identities of alleged union agents and could have sought to call officers to testify about the calls). The only way for Respondent to get the information regarding Claimants' search for work efforts is through Claimants themselves. Claimants' refusal to comply with Respondent's subpoenas is nothing short of willful.

Throughout the proceedings, Claimants repeatedly attempted to conceal documents that negatively impacted their case. This was demonstrated through Claimants' rolling and delayed production of their respective resumes (which included undisclosed interim employers and characterized their position as sales) and bank statements (some of which included multiple cash deposits for which Claimants could not account). CGC wholly fails to address Claimants' misconduct during the proceedings, simply stating the conduct occurred after the ALJ's sanction ruling and is therefore irrelevant to the Board's reconsideration of the ruling. CGC Opp. p. 4, fn. 4. CGC's argument misses the essence of the injustice caused by Claimants' actions.

Claimants should not be rewarded for their misconduct because they chose to continue and worsen their conduct after the sanction ruling. Rather, Claimants' continued misconduct perfectly demonstrates Respondent's contention that Claimants disregarded Respondent's subpoenas, the subpoena process, and the ALJ's Orders and that sanctions were warranted. Claimants' conduct

throughout the proceedings as a whole are absolutely relevant to determine whether the ALJ's order was "unduly harsh" or "disproportionately severe." Given Claimants' repeated efforts to conceal damaging documents, it is apparent the sanctions were appropriate.

Moreover, the ALJ issued the sanctions based on the her credibility determinations from Claimant's testimony regarding their search efforts and their document production. The Board should not overrule the ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates they are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

**C. CGC Continues to Act as Claimants' Counsel in Violation of Respondent's Due Process Rights.**

CGC continues to act as Claimants' counsel in violation of Respondent's due process rights. In her Opposition, CGC asserts Claimants engaged in "a diligent search effort" to produce documents responsive to Respondent's subpoenas. CGC Opp. p. 2. However, CGC is not Claimants' counsel and cannot attest to their search efforts. CGC engaged in similar conduct during the course of the proceedings by repeatedly making representations of Claimants' alleged efforts. Tr. 76, 132, 888. Additionally, on the first day of the Hearing, the ALJ instructed Claimants to contact Respondent with questions regarding the subpoenas, which they chose not to do pursuant to CGC's instruction. Tr. 33. CGC also unilaterally received documents on multiple occasions from Claimants that were not produced to Respondent.

By engaging in the above conduct, CGC has acted as Claimants' counsel. CGC cannot instruct and communicate with Claimants regarding subpoena production and make representations on behalf of Claimants, then assert Claimants are simply *pro se* claimants without any assistance in these proceedings. CGC's conduct violates Respondent's due process rights. CGC's assertions regarding Claimants' efforts to comply with the subpoenas must be disregarded.

**D. CGC Failed to Address Any of Respondent's Arguments that the Different Measures Proposed by the Board Instead of Sanctions Would Have Been Ineffective Given Claimants' Misconduct.**

CGC failed to address any of Respondent's arguments that the different measures proposed by the Board in its ruling in lieu of sanctions would have been ineffective given Claimants' ongoing misconduct throughout these proceedings. As mentioned above, CGC failed to address any of Respondent's arguments regarding Claimants' continued misconduct during the Hearing stating that the actions occurred after the ALJ's ruling and were thus irrelevant and should not be considered by the Board. CGC Opp. p. 4, fn. 4. CGC is mistaken.

To determine whether sanctions are unduly harsh, the Board must weigh the sanctions against the noncompliance. See Toll Manufacturing Company, 341 NLRB 832 (2005). Here, there is no doubt Claimants failed to comply with Respondent's subpoenas at the time the sanctions were imposed. The alternatives proposed by the Board would not have resulted in compliance. In fact, as the Hearing proceeded, Claimants' noncompliance only worsened.

Both Claimants willfully withheld documents that were damaging to their case. Both Claimants produced documents to CGC and/or the Compliance Officer but failed to produce the same documents to Respondent even though they were responsive to Respondent's subpoena requests. Both Claimants failed to comply with Respondent's subpoenas even after having an additional 4 weeks to do so after the sanctions were imposed. These 4 weeks were in addition to the 3 months Mares had to gather documents in response to the subpoenas served on his trucking company and the 30 days he had to gather documents in response to the subpoena served on him individually. This was also in addition to the 33 days Avila had to gather documents in response to the subpoena served on him.

Given Claimants' willful misconduct, allowing Claimants to testify about interim earnings while they concealed documents regarding that very issue would have only rewarded



their bad conduct. Had they been allowed to testify about interim earnings, it is highly unlikely they would have produced the few damaging documents they did.

In sum, Claimants' blatant misconduct demonstrates a total disregard of Respondent's subpoenas and due process rights, the ALJ's Orders, and the importance of these proceedings. Claimants' continued misconduct is made even more egregious by the fact that it occurred after sanctions were imposed. Given Claimants' actions, it is clear the ALJ's sanctions were warranted and proportionate to Claimants' noncompliance.

**E. Since the Board's Ruling Was a Departure From Board Precedent, the Ruling Was a Material Error Warranting Reconsideration.**

The Board's ruling was a departure from NLRB precedent, resulting in a material error within the meaning of Section 102.48(c)(1) of the Board's Rules and Regulations, warranting reconsideration. See Wal-Mart Stores, Inc., 351 NLRB 130, 136 (2007).

The ALJ's Order was not directed at CGC, but rather, to punish Claimants' conduct and deter Claimants from further misconduct. Board precedent is clear that the ALJ has the authority to impose sanctions upon a bad actor. See 300 Exhibit Services & Events, 356 NLRB No. 66, fn. 1 (2010) (noting that "[i]t is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes abuse of discretion"). Board precedent also demonstrates that CGC can be sanctioned for Claimants' misconduct, including refusal to comply with Respondent's subpoenas. The use of sanctions has included the imposition of evidentiary sanctions. See, e.g., Bannon Mills, 146 NLRB 611, 613, n. 4, 633-634 (1964); McAllister Towing & Transportation, 341 NLRB 394, 396-397 (2004), *enfd.* 156 Fed.Appx. 386 (2d Cir. 2005) ("The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance."); Hedison Mfg. Co. v. NLRB, 643 F.2d 32, 34 (1st Cir. 1981).

As demonstrated above, Board law is clear the ALJ may impose evidentiary sanctions on CGC for Claimants' failure to comply with Respondent's subpoenas and the ALJ's Orders. The Board's ruling that the sanctions imposed were unduly harsh resulted in a material error warranting Respondent's request for reconsideration. See generally Desert Aggregates, 340 NLRB 1389 (2003); St. Regis Paper Co., 301 NLRB 1236 (1991). Furthermore, given the additional facts that Claimants' misconduct not only continued after the ruling, but worsened and resulted in Claimants willfully withholding documents, also warrant Respondent's request for reconsideration.

Moreover, Respondent need not expressly use the terms "extraordinary circumstance" or "material error" in its Motion when "it clearly identifies the claimed errors in the Board's decision and the circumstances that assertedly compel reconsideration of them." Enloe Med. Ctr., 346 NLRB 854, 855 (2006). In its Motion, Respondent explained at length the Board law governing this topic and detailed the circumstances which require reconsideration. CGC's contention that Respondent failed to meet the "extraordinary circumstance" requirement of Section 102.48(c)(1) of the Board's Rules and Regulations fail.

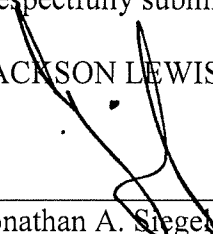
### III. CONCLUSION.

Based on the above reasons and those stated in Respondent's Motion, Respondent respectfully requests the Board reconsider its Order and affirm the ALJ's order that CGC cannot question any witnesses (except for the Compliance Officer) regarding Claimants' interim earnings.

Dated: October 12, 2017

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, I caused the foregoing *Respondent's Reply to Counsel for the General Counsel's Opposition to Respondent's Motion for Reconsideration of NLRB Order* to be filed with the Office of the Executive Secretary/National Labor Relations Board, using the CM/ECF system.

On October 12, 2017, I hereby certify that I am filing a Certificate of Service with the Office of the Executive Secretary/National Labor Relations Board, using the CM/ECF system and I am causing a copy to be served via electronic mail upon the following:

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